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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. .....

WALGREEN CO., and
ALLIED ELECTRIC PRODUCTS, INC.,
Petitioners,

vs.

GEORGE H. GLADE, JR.,
Respondent.

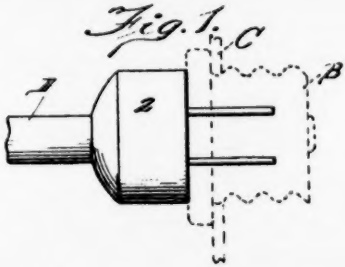
PETITION OF WALGREEN CO. AND ALLIED ELECTRIC PRODUCTS, INC., FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Walgreen Co. and Allied Electric Products, Inc., respectfully pray for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to review the judgment of that Court entered on the 22nd day of July, 1941 (Petition for Rehearing denied September 12, 1941). A transcript of the record in this case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with the rules of this Court.

Summary and Short Statement of the Matter Involved.

1. Respondent, George H. Glade, Jr., is the owner of Martin patent No. 2,115,642, granted April 26, 1938, for an alleged invention in "ELECTRICAL CONDUCTOR TERMINAL CAP" (the familiar so-called electric plug commonly inserted into a wall socket for connecting lamps or other electric appliances into an electric circuit). To make plain the type of plug in question, the showing of the same in Figure 1 of the Martin patent is reproduced below.)



2. Petitioner, Allied Electric Products, Inc., is a New Jersey corporation with its factory located at Irvington, New Jersey, and is engaged, *inter alia,* in the manufacture of electric plugs. Petitioner, Walgreen Co., is an Illinois corporation, having an established place of business in Chicago, Illinois, and owning and operating a chain of drug stores located in various cities throughout the United States, including Illinois, and through them sells, *inter alia,* electrical appliances provided with electric plugs manufactured by Allied.

3. The accused plugs are of a type commonly known as "manufacturer's plugs." This means that the plugs are of a type in which the unassembled parts of the plug (the plug body and two contact blades for each plug) are sold to manufacturers of electrical appliances. The lat-

ter assemble these parts with an electric conductor cord, in applying the plugs to the electrical appliances which such manufacturers make.

4. Respondent instituted a suit against Petitioner, Walgreen, on Claims 1, 5, 7, 8, 9, 10 and 11 of the Martin patent in the United States District Court for the Northern District of Illinois, Eastern Division, charging infringement by reason of the sale by Walgreen of electrical appliances having thereon the accused plugs. Petitioner, Allied, intervened as a party defendant and assumed the defense of the case.*

5. The Martin patent discloses (R. 318) an electric plug of familiar and well-known general form. The particular plug shown in the patent consists of a plug body of insulating material, into one side of which extends a conductor cord and from the opposite side of which projects a pair of blades or prongs for insertion into the usual socket. Each of the blades has on its butt end portion a series of laterally projecting barbs which dig into the side walls of preformed holes in the plug body and thus hold the blades in place when the blades are jammed into the holes. The conductor cord is led through a central hole in the plug body, the ends of the two wires of the cord being bent apart, bared, and led to the holes which receive the blades, where they are wedged between the blades and the hole walls. Electrical contact is thus secured between the bare ends of the wires and the respective blades.

6. Respondent asserted, and the Court of Appeals below held (R. 674) that the patentee, Martin, had accomplished in a three-part plug (two blades and a plug body)

* Petitioner, Allied, after intervening, counterclaimed for infringement by Glade of its McCormick patent No. 1,961,235, but no review is here sought of the judgment of the Court below invalidating said McCormick patent.

what had theretofore required five parts (the same two blades and a plug body, plus two screw parts for clamping the wires to the respective blades). But having arrived at this conclusion, the Court of Appeals below upheld all of the Martin patent claims in suit, *despite the fact that, as stated even in the Court's own opinion, Claims 1, 5, 7 and 11 make no reference to any particular form of wire attachment to the blades and relate solely to means for mounting the blades in the plug body structures which they define. In other words, the Court of Appeals below validated Martin's group of broad claims on the ground that Martin was the first to produce a three-part plug, as contrasted with the five-element plugs of the prior art, despite the fact that this particular group of claims is broad enough to, and was intended to, cover a five-part plug as well as a three-part plug.*

7. It is to be observed that although the Court of Appeals below did make some grouping of the Martin claims on the basis of scope, which, as pointed out above, it subsequently failed to adhere to in its decision, the District Court did not in its opinion make any distinction between various ones of the Martin claims. In other words, the District Court simply found that there was invention present and did not analyze the individual claims to determine whether or not each or any of them actually defined that invention. Consequently, there is no concurrence of opinion below of invention in the several claims in issue. *Altoona Publix Theaters* v. *American Tri-Ergon Corp.*, 294 U. S. 477 at p. 480.

8. Of the group of broad claims of the Martin patent noted above, Claim 5 was selected by the Court of Appeals below as typical (see opinion R. p. 674). It does not differentiate even in words, much less in substance, from the prior art. For example, even in the old 1912

British patent of Day, No. 14,306 (R. 597), is shown a plug comprising a plug body with two prongs jammed into preformed holes in it, but in which the wires enter *directly* into these same holes rather than passing circuitously first through a central hole and then into the blade-receiving holes as shown by Martin. Although Martin's Claim 5 is wholly *silent* as to any central hole for entry of the wires, and obviously broad enough to embrace the British patent structure of 1912, the Court of Appeals below sustained this claim by *reading into it by implication* language which plainly is not there. *The Court below thus read into the claim, in order to save it from the prior art, a limitation which it lacked. Such a mode of construction for patent claims is in direct conflict with the previous decisions of this Court.*

9. It is characteristic of all of the Martin claims in suit that they call for *two* blades as distinguished from one or three, or any other number, and this despite the fact that all of these various numbers of blades are commonly used in the art. The number of blades on the plug depends merely upon the number of wires in the electric circuit in which it is employed. It is thus apparent that the assertion on behalf of Martin that he invented a new three-part plug proceeds upon a false premise, for it entails the arbitrary inclusion of *two* blades as contrasted with any other number. Even taking Respondent's contentions at face value, namely, that Martin was the first to fasten both a connector blade and a wire to an insulating base simply by a frictional wedging of the same into a hole, still his resulting combination comprised merely two parts (viz: a blade and a plug body), and *not* three parts (*i.e., two* blades and a plug body). Respondent has made no showing that the inclusion of the extra blade in the claimed combination is anything but superfluous,

wherefore all of the Martin claims set forth a mere unpatentable *aggregation.*

10. The Court of Appeals below made no attempt in its opinion to justify its validation of the plainly aggregative Martin claims over such prior patents as British patent to Cook, No. 291,583 (R. 653), which plainly disclosed the basic two-part combination that Martin later utilized. The aggregative character of the Martin claims thus not only renders them defective as a matter of law, but obscures the true pertinency of the prior art.

11. Prior to the issuance of the injunction in this case, Petitioner, Allied, was the largest single manufacturer of manufacturer's type electric plugs in the United States, supplying approximately one-third of such plugs used during the two year period between issuance of the Martin patent and granting of the injunction. *During the period noted, Allied sold more than 30,000,000 such plugs* (see affidavit herewith). *The granting of an injunction on the Martin patent in this case has caused such a serious shortage in manufacturer's type plugs that purchasers have had actually to curtail their sales of electrical appliances. Because of the shortage of manufacturer's plugs, former purchasers of the same have had to use plugs of other types costing as much as four hundred per cent more. The injunction in this case thus affects such a large volume of business as to be vital to the industry as a whole, wherefore this petition for a writ of certiorari has been presented.*

Reasons Relied Upon for the Grant of a Writ of Certiorari.

The discretionary power of this Court is invoked upon the following grounds:

1. Because the Court of Appeals for the Seventh Circuit has sustained as valid a patent against a defendant (Petitioner Allied) which was theretofore the largest supplier of manufacturer's type electric plugs in the United States, *whereby the users of such plugs have been deprived of substantially one-third of their previous supply (at least 15,000,000 plugs per year) with the result that an acute shortage of plugs has ensued, wherefore the issues presented between the parties in this cause are vital to the industry as a whole.*

2. Because the Court of Appeals for the Seventh Circuit has, in order to sustain a patent claim, read into such claim *by implication* an element which it does *not* in fact contain, *though the inclusion of such element was requisite to distinguish the claim even in words, much less in substance, from the prior art.* This holding is untenable because it is in direct conflict with the applicable decisions of this Court.

3. Because the Court of Appeals for the Seventh Circuit has *sustained as valid certain patent claims upon the ground that the patentee had invented a certain three-part plug (as distinguished from prior art plugs composed of five parts) despite the fact that the very claims in question are broad enough to, and were intended to, cover a five-part plug;* wherefore said holding is untenable, being in direct conflict with the applicable decisions of this Court.

4. Because the Court of Appeals for the Seventh Circuit has sustained as valid a patent for an alleged combination which is *unpatentably aggregational on its face,* thereby rendering a decision which is untenable because

it is in direct conflict with the applicable decisions of this Court.

WHEREFORE, your petitioners pray that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Court of Appeals for the Seventh Judicial Circuit, commanding said Court to certify and send to this Court, on a date to be designated, a full transcript of the record and all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, as to the questions herein presented, as well as to the questions of anticipation and invention, and that the judgment of the Court of Appeals be reversed insofar as it found validity for Martin patent No. 2,115,642, and that petitioners may be granted such other and further relief as may seem proper.

Respectfully submitted,

C. PAUL PARKER,
Counsel for Petitioners.

Affidavit in Support of Petition for Writ of Certiorari.

County of Essex, }
State of New Jersey. } ss.

Nathan Chirelstein, being duly sworn, deposes and says that he is of legal age, and is the President of Petitioner, Allied Electric Products, Inc.;

That his company made and sold more than 30,000,000 of the accused plugs in a period of approximately two years between the issuance of the Martin patent and the stoppage of such manufacture by injunction in this cause; that during such period his company was the largest producer of manufacturer's type plugs in the United States, the output of his company representing substantially one-third the entire supply of manufacturer's plugs in the United States during that time; that since the issuance of the injunction in this case, former purchasers of the accused plugs have reported an acute shortage of manufacturer's type plugs and have had to curtail their sales of electrical appliances in consequence of such shortage; that since the issuance of said injunction some manufacturers of electrical appliances have had to use plugs, other than manufacturer's type plugs, costing substantially four hundred per cent more than manufacturer's plugs did prior to the issuance of said injunction.

Nathan Chirelstein.

Subscribed and sworn to before me this ..... day of ....., 1941.

.....

Notary Public.

(Seal)